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IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

No. 2:02-CR-0246-03

Court of Appeals No. 13-16121

Plaintiff,

UNITED STATES OF AMERICA,

VS.

ORDER DENYING CERTIFICATE OF
APPEALABILITY

OCTAVIO HERNANDEZ SUAREZ,

Defendant.

Defendant Octavio Hernandez Suarez has filed notice of appeal from this court's judgment of seeks a Certificate of Appealability from this court's Judgment of April 30, 2013, adopting the Findings and Recommendations of the Magistrate Judge and denying defendant's application for a writ of audita querela without prejudice. The matter is now before this court on remand from the Court of Appeals, pursuant to the Order of Appellate Commissioner Peter L. Shaw, for the limited purpose of granting

or denying a certificate of appealability.

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A certificate of appealability may issue under 28 U.S.C. § 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This court is unable to discern any issue that petitioner can demonstrate is "'debatable among jurists of reason,'" could be resolved differently by a different court, or is "'adequate to deserve encouragement to proceed further.'" See Jennings v. Woodford, 290 F.3d 1006, 1010 (9th Cir. 2002) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 (1983)).

First, while the writ of audita querela may have historically had some application at common law, it has no application in present day criminal proceedings in the federal courts. Second, construing the petition as an application for relief under 28 U.S.C. § 2255, for the reasons explained with clarity in the magistrate judge's Findings and Recommendations, filed April 5, 2013, because defendant previously filed a motion to vacate pursuant to 28 U.S.C. § 2255, he must move in the Court of Appeals for an order authorizing this court to consider his present application before this court may consider them. See 28 U.S.C. § 2244. This court's order denied defendant's motion without prejudice to his seeking such certification from the Court of Appeals.

IT IS THEREFORE ORDERED that a certificate of appealability be, and the same hereby is, DENIED. The Clerk of

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this court is ordered to forward a copy of this order to the Clerk of the United States Court of Appeals for the Ninth Circuit forthwith. DATED: July 23, 2013 UNITED STATES DISTRICT JUDGE